Editor's note: 87 I.D. 395

ANDREW L. FREESE

IBLA 80-448 Decided September 9, 1980

Appeal from a decision of the Idaho State Office, Bureau of Land Management, denying a petition for deferment of assessment work on various unpatented lode mining claims and millsites. I 14532.

Affirmed as modified.

1. Mining Claims: Generally--Mining Claims: Assessment Work

   In order to obtain a temporary deferment, a claimant must file with the authorized officer of the proper office a petition in duplicate requesting such deferment. The applicant must attach to one copy thereof a copy of the notice to the public required by the Act which shows that it has been filed or recorded in the office in which the notices or certificates of location were filed or recorded.

2. Mining Claims: Generally--Mining Claims: Assessment Work

   A petition for deferment of annual assessment work is properly denied where a claimant's mining claims and millsites have been declared null and void by the Department.

APPEARANCES: Andrew L. Freese, pro se.

OPINION BY ADMINISTRATIVE JUDGE BURSKI

Andrew L. Freese appeals from a February 6, 1980, decision of the Idaho State Office, Bureau of Land Management (BLM), which rejected his petition for deferment of assessment work on appellant's mining claims, which are located within the Sawtooth National Recreation Area. 1/ The decision noted that appellant had failed to attach a copy of the required notice to the public, showing that it had been filed or recorded in the office in which the notices or certificates of location were filed or recorded. See 43 CFR 3852.2(a). Secondly, the BLM decision adverted to an order entered by the United States Court of Claims dismissing a suit brought by petitioner relating to all of the instant mining and millsite claims.

The "Pole" group of mining claims and millsites were the subject of a Government contest I-9758. By decision dated March 6, 1978, Administrative Law Judge Harvey C. Sweitzer declared all of the claims null and void. On April 22, 1978, while the case was on appeal to this Board, appellant requested a deferment of annual assessment work

1/ The mining claims and millsites will be treated as two distinct groups for the purposes of this decision. The "Pole" group will consist of: Pole #3 through #16, Pole #18, Pole #21, Pole #31, Pole A, B, and C, URA, and WO3. The "URA" group will include the URA #2, URA #4, URA #5, URA #9, URA #10, URA #11, URA#13, URA #14, and She Lode.

for the "Pole" mining claims, pending the outcome of his appeal. This application was deficient for various reasons, and on May 18, 1978, appellant filed a second petition accompanied by the required fee and containing the additional information requested. On July 26, 1978, the State Office granted appellant's request for deferment of assessment work for the period from October 1, 1977, to September 30, 1978. 2/ On September 6, 1978, subsequent to the grant of this deferment, the Board, by decision styled United States v. Freese, 37 IBLA 7 (1978), affirmed the decision of the Administrative Law Judge in all respects.

The "URA" group of mining claims and millsites were the subject of a separate contest I-13341. The contest complaint in this case had been filed on April 27, 1977, and an answer was duly filed. After various postponements a hearing was scheduled for May 22, 1979. On February 26, 1979, however, attorney for appellant "withdrew his opposition to the contest." By order dated March 8, 1979, Administrative Law Judge Michael L. Morehouse took the allegations of the complaint as admitted and declared all of the claims null and void. No appeal was taken from this decision.

2/ Pole #17 lode mining claim was included within this application. Pole #17 was originally included in contest No. I-9758, but was dismissed from the proceeding. By separate decision of July 26, 1978, the requested deferment for this claim was denied on the grounds that since it was no longer involved in the contest proceeding there was no basis for granting a deferment.

Appellant filed a suit for judicial review of the Board's decision in United States v. Freese, supra, in United States District Court, sub nom. Freese v. Andrus, Civ. 78-1314 (D. Idaho, filed November 20, 1978). That suit was voluntarily dismissed without prejudice. Appellant had also filed suit in the United States Court of Claims, seeking, inter alia, compensation for alleged inverse condemnation of the mining claims and millsites in both the "Pole" and "URA" groups. Freese v. United States, No. 334-78 (Ct.Cl., filed July 24, 1978). On October 10, 1979, appellant sought a second deferment of annual assessment requirements, expressly referring to his suit in the Court of Claims.

On November 9, 1979, the Court of Claims dismissed appellant's suit regarding all of the claims at issue herein, expressly finding that it did not have jurisdiction to review the Department of the Interior's conclusion that these claims were invalid. On February 6, 1980, the Idaho State Office issued the decision which is the subject of the instant appeal.

Initially, we would note that to the extent that appellant sought a deferment of annual assessment work for the five subject millsites, the petition must be rejected, though not for the reasons given by the State Office. Succinctly stated, there is no requirement that a millsite claimant perform any assessment work. It is impossible to grant a meaningful and efficacious deferment where there is no requirement to perform assessment work.

[1] With regard to the question whether or not appellant had filed a copy of the notice to the public required by the applicable regulation, 43 CFR 3852.2(a), appellant points out that the certification was located in the middle of his petition for deferment, and further argues that this was precisely the method he had utilized in his earlier petition, which BLM had granted. With regard to the statement of the recorder that such a notice was recorded, appellant argues that a great deal of time transpires between the filing and recording of a notice, and the receipt of proof of recordation from the county recorder's office, and that in the instant case appellant did not receive the notice from the county recorder until February 4, 1980, only two days prior to the State Office decision.

As regards the form of the certification, the record bears out appellant's contention. The form of certification which appellant utilized in his second petition for deferment is exactly the same as that which he used in his original petition which the State Office granted. Thus, we are led to the conclusion that it was the absence of a certification by the county recorder, attesting that the petition had been filed with that office, which served as the basis for the State Office's decision. We feel that were this the only deficiency in appellant's petition, the State Office's decision could not be sustained. The State Office should have informed appellant of the deficiency and given him an opportunity to supply the necessary document. We note that appellant's original petition for deferment had been

deficient in a number of ways, including a failure to submit the requisite filing fees. His petition was not rejected at that time; rather, he was given an opportunity to cure the deficiencies. We see no reason why such an opportunity was not afforded appellant herein.

[2] The State Office, however, also premised its rejection of appellant's petition, on the decision of the Court of Claims dismissing appellant's suit as concerned the instant claims. Appellant contends that the decision of the Court of Claims was interlocutory in nature and that he intends to pursue his appeal to the United States Supreme Court. But until a court of competent jurisdiction rules otherwise, appellant's claims have been finally determined by the Department to be a nullity. With particular regard to the "URA" group of claims, we would point out that appellant withdrew his answer to the Government contest, which Judge Morehouse correctly found was the same as admitting the charges contained in complaint I-13341. Appellant failed to appeal Judge Morehouse's decision to this Board. Thus, appellant did not exhaust his administrative remedies, as required by 43 CFR 4.21(b), and may not now seek judicial review. See Rawls v. Secretary of the Interior, 460 F.2d 1200 (9th Cir. 1972). The "URA" claims have been finally held to be invalid, and no deferment for assessment work can be granted as no claims now exist.

Concerning the "Pole" group of claims, we note that the applicable statute, section 1, c. 232 of the Act of June 21, 1949,

63 Stat. 214, 30 U.S.C. § 28b (1976), provides, in pertinent part, that:

> [Annual assessment work] may be deferred by the Secretary of the Interior as to any mining claim or group of claims in the United States upon the submission by the claimant of evidence satisfactory to the Secretary that such mining claim or group of claims is surrounded by lands over which a right-of-way for the performance of such assessment work has been denied or is in litigation or is in the process of acquisition under State law or that other legal impediments exist which affect the right of the claimant to enter upon the surface of such claim or group of claims or to gain access to the boundaries thereof. [Emphasis supplied.]

Appellant argues in effect that the claims are still in litigation and that therefore he clearly qualifies for a deferment. While the absence of any meaningful punctuation in this section clearly creates interpretative problems, the sequence of phrases, as well as the legislative history, demonstrates that it is not the "claims" which must be in litigation, but rather "access" to the claims must be the subject of dispute.

With reference to the sequence of phrases, it must be noted that the phrase "or is in litigation" is followed by the phrase "or is in the process of acquisition under State law." This section is, necessarily, only applicable to unpatented claims, the legal title of which resides in the United States until issuance of patent. Thus, if the antecedent of this latter phrase were "mining claim" this section would be insensible as there is no authority by which State law may

permit the acquisition of lands in Federal ownership. This phrase must, therefore, relate to access to the claim rather than the claim itself.

The legislative history of this section, though meager, supports this interpretation. Examples of situations in which the provisions of this law could be invoked were provided in S. Rep. No. 405. The Congress particularly noted that the bill would cover "[d]elays in causing legal condemnation of rights-of-way, which can be contested for a long time in the courts." S. Rep. No. 405, 81st Cong., 1st Sess. reprinted in [1949] U.S. Code Cong. & Ad. News 1404. Concerning the phrase "is in litigation" the Senate report took express notice of the "[d]elays in overcoming by court action the posting of 'No trespass' signs on roads which have been used by the public for many years but have never been declared public roads." Id. Thus, it is clear that the subject matter of the litigation must be access to the claim and not the claim itself.

The final alternative listed in section 28b, however, relates to a showing that "other legal impediments exist which affect the right of the claimant to enter upon the surface of such claim." Appellant argues that it is unlikely that the administration of the Sawtooth National Recreation Area will approve an operating plan for the performance of assessment work as required by 36 CFR 292.18(c).

The Board has interpreted this part of section 28b on a number of different occasions, most recently in Charlestone Stone Products, Inc., 32 IBLA 22 (1977). Therein, the Board stated:

> The major policy goal implicit in the language of this statute is the protection of claimants whose rights of access to their claims have been impeded or denied. The relief provisions of the statute are intended to be triggered by considerations of relative necessity, not inconvenience or ordinary business risk.

Id. at 23. In that case, the Board noted that its decision, while still in litigation, had been reversed by the district court, and held that "this legal dispute, even if ultimately prolonged by a grant of certiorari by the United States Supreme Court, does not constitute a 'legal impediment' within the meaning of [section 28b]." Id.

A significantly different problem is presented in the instant appeal. Unlike the lands embraced by the Charlestone Stone Products claims, lands within the Sawtooth National Recreation Area are not open to new mineral entries. See section 10, Act of August 22, 1972, 86 Stat. 612, 614, 16 U.S.C. § 460aa-9 (1976). Moreover, there has been no judicial disturbance of the Board's decision relating to the invalidity of the claims, though appellant avers that he intends to pursue this matter to the Supreme Court. In effect, the question is

whether it is possible to grant a petition for deferment of assessment work when the claim for which the petition is sought has been determined finally, within the Department, to be invalid where there has been no contrary judicial finding. We hold that such a petition may not be granted; allowance of such a petition would constitute an action directly contrary to, and inconsistent with, the finding of invalidity.

While it is possible that a Federal court may subsequently determine that the Department's decision invalidating a claim was erroneous, until such a decision is rendered there is no cognizable claim against the Government. In the absence of a timely appeal, the decision of the Department is final and of immediate effect. The effect of a court reversal is to reinstate a claim, on a nunc pro tunc basis. But until such action occurs, there is no claim extant. Thus, there is no assessment work obligation, and no possibility for obtaining a deferment of assessment work.

To hold otherwise would require that the Government grant a deferment of assessment work for a claim whose existence the Government denies. Moreover, inasmuch as the statute provides for only 2 years of deferment, regardless of the justification, (see Charlestone Stone Products, supra at 24; 30 U.S.C. § 28c (1976)), the Government might well be required, even in the case of withdrawn land,

to permit the performance of assessment work, and the concomitant surface disturbance, in situations in which the Department has declared the claim a nullity. At least as regards withdrawn land, such a result would seem contrary to elementary logic.

The unavailability of a deferment, however, does not prejudice the rights of a mineral claimant. To the extent that the land is open to mineral entry, a claimant would still have the right to go out onto the land and perform assessment work such as would protect him from adverse claims by third-parties. As regards those claims embraced by withdrawals, there is no possibility of the initiation of new adverse claims by third-parties, and so long as notices of intention to hold the claim were annually filed as required by section 314 of the Federal Land Policy and Management Act of 1976, 90 Stat. 2743, 2769 43 U.S.C. § 1744 (1976), there can be little doubt that, should a Federal court reverse a determination of invalidity, the failure to actually perform assessment work would not independently serve as a predicate for invalidating the claim.

In conclusion, we hold that upon the final determination by this Board that a claim is invalid, and absent an intervening decision of a Federal court contrary thereto, no deferment of annual assessment work may be granted.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed as modified.

James L. Burski
Administrative Judge

We concur:

Edward W. Stuebing
Administrative Judge

Frederick Fishman
Administrative Judge